No. 84-78

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT L. CAMPBELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that the agency had satisfied its burden of persuasion with respect to petitioners' participation in the air traffic controllers' strike.

2. Whether the notices of proposed removal sent to petitioners improperly provided less than seven days for a response.

3. Whether internal memoranda of the general counsel of the Merit Systems Protection Board violated 5 U.S.C. 1205(g), which provides that the Board "shall not issue advisory opinions."

4. Whether the court of appeals correctly sustained petitioners' removal as an appropriate penalty for their participation in an unlawful strike against the United States.

PARTIES TO THE PROCEEDING

The petitioners before the court of appeals are listed at Pet. App. 14. The petition does not indicate whether it is filed on behalf of all of these parties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 735 F.2d 497. The opinion of the Merit Systems Protection Board (Pet. Supp. App. 1-25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) called upon its members to engage in a nationwide strike against the United States. See *Anderson* v. *Department of Transportation*, 735 F.2d 537, 539 (Fed. Cir. 1984). The same day, the President of the United States issued the following announcement at 11:00 a.m. eastern daylight time (*ibid.*):

> I must tell those who failed to report for duty this morning they are in violation of the law [1] and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated.

The Federal Aviation Administration, which employed the controllers, implemented the 48-hour deadline by sending a notice of proposed removal to each controller who failed to report for duty at his first scheduled shift after 11:00 a.m. eastern daylight time on August 5, 1981 (*ibid.*).

Petitioners are among the more than 11,000 controllers who did not report for duty after August 3, 1981. Between August 7 and 19, each was sent a notice of proposed removal after it was determined that he had missed his deadline shift. Each notice stated that "you may reply to this notice personally, in writing, or both * * * within 7 calendar days

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[1] 5 U.S.C. 7311(3) provides:

> An individual may not accept or hold a position in the Government of the United States * * * if he * * * participates in a strike, or asserts the right to strike, against the Government of the United States * * *.

18 U.S.C. 1918 provides for criminal penalties against those who violate Section 7311.

after you receive this letter." Petitioners' requests for extensions of time within which to reply were denied. None of the petitioners made a reply affirming or denying the charges against him during the seven-day period; although their designated representative had been informed that petitioners could call their Air Traffic Control Center to schedule times for oral replies, none of them did so. Each petitioner was subsequently removed from his position. Pet. App. 2.

b. Following their removal, petitioners appealed to the Denver Regional Office of the Merit Systems Protection Board. After a five-day hearing on their consolidated appeals, the presiding official issued a decision sustaining their removal. The full Board affirmed (Pet. Supp. App. 1-25). Petitioners then sought review by the United States Court of Appeals for the Federal Circuit. Theirs was one of nine appeals treated as a "lead case" by the court of appeals, while more than 3,000 other appeals were stayed pending decisions in the lead cases.

2. On May 18, 1984, a five-judge panel of the court of appeals issued eleven decisions in the nine lead cases.[2] Relying in part (Pet. App. 3-4) on its

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[2] In addition to the instant case, the court below decided the following cases: *Schapansky* v. *Department of Transportation*, 735 F.2d 476 (Pet. App. 16-37); *Adams* v. *Department of Transportation*, 735 F.2d 488 (Pet. App. 38-58); *Martel* v. *Department of Transportation*, 735 F.2d 504; *Johnson* v. *Department of Transportation*, 735 F.2d 510; *Dorrance* v. *Department of Transportation*, 735 F.2d 516 (Pet. App. 58-66); *Novotny* v. *Department of Transportation*, 735 F.2d 521; *Moylan* v. *Department of Transportation*, 735 F.2d 524; *DiMasso* v. *Department of Transportation*, 735 F.2d 526; *Le-*

decisions in two other lead cases, *Schapansky* (Pet. App. 16-37) and *Adams* (Pet. App. 38-58), the court rejected each of the arguments now advanced by petitioners. The court held in *Schapansky* (Pet. App. 23-28) that the burden of proof had not been impermissibly changed by the Board and that petitioners had not been denied an adequate opportunity to present evidence with respect to their participation in the strike. In *Adams* (Pet. App. 41 n.3), the court rejected as "semantic and senseless" the argument that the removal notices, which provided for a reply "within 7 calendar days," violated the statutory requirement (5 U.S.C. 7513(b)(2)) that "not less than 7 days" be allowed for a reply. The court also held (Pet. App. 7-9) that 5 U.S.C. 1205(g), which prohibits the Board from issuing advisory opinions, does not prohibit its general counsel from circulating to Board officials "legal memoranda reflecting research into common issues." Finally, in *Schapansky* (Pet. App. 31-32), the court held that removal for participation in an illegal strike was a permissible penalty, without addressing the question whether removal was mandatory under the statutes (5 U.S.C. 7311, 18 U.S.C. 1918) prohibiting strikes by employees of the United States.

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tenyei v. *Department of Transportation*, 735 F.2d 528; and *Anderson* v. *Department of Transportation*, 735 F.2d 537. The court also decided one case involving the removal of a supervisory air traffic controller, *Brown* v. *Department of Transportation*, 735 F.2d 543. The court affirmed each of the removals except for the supervisor's and Letenyei's. Two petitions (Nos. 84-258, 84-259 (filed Aug. 16, 1984)) are pending in which certain of the air traffic controllers whose claims were decided in these cases are seeking review by this Court.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issues raised by petitioners, which concern for the most part minor alleged improprieties in the procedural aspects of their removal, are not of such exceptional importance as to justify review by this Court, in light of the exclusive jurisdiction over appeals from the Merit Systems Protection Board vested in the United States Court of Appeals for the Federal Circuit. 28 U.S.C. 1295(a)(9). Accordingly, further review is unwarranted.

1. Petitioners challenge (Pet. 12-19) the allocation of the burden of proof adopted by the Board and approved by the court of appeals with respect to whether an employee has participated in an unlawful strike. The approach applied below properly requires that the agency bear at all times the burden of persuasion with respect to strike participation: the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others (Pet. App. 24-25).[3] Once the agency has presented a

[3] Although the Board stated at one point that the burden of persuasion would shift to the employee (see Pet. 13), the court of appeals correctly stated in *Schapansky* (Pet. App. 25) that "[i]t is clear * * * from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case." See Pet. Supp. App. 4 (Board explains that employee's burden under its *Schapansky* decision is "to present evidence showing that he was without knowledge of the strike or that his absence from duty was due to some other factor. However, the agency bears the burden of ultimately proving by a preponderance of the evidence that the [employee] had participated in the strike").

prima facie showing of participation by evidence of the employee's unauthorized absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing" (*id.* at 24). Petitioners presented no evidence at the five-day hearing before the Board's presiding official to rebut the inference that they had participated in the strike, to excuse their unauthorized absences from work, or to suggest that, although "the strike was well and widely known" (*ibid.*), they had no knowledge of it. See Pet. Supp. App. 4-5, 12. In these circumstances, the conclusion that the agency had established, by a preponderance of the evidence, that petitioners had withheld their services in concert with others was amply justified.[4]

Petitioners contend that the Board and the court of appeals departed from prior practice by failing to require direct proof that the employee actively participated in the strike.[5] It is clear, of course, that the

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[4] The burden of production following the agency's presentation of a prima facie case was not "impermissibly shift[ed] * * * to the employee" (Pet. 18-19). It is wholly justifiable to require that the employee come forward with evidence, to which he would have the most direct access, explaining his unauthorized absence, once the agency has presented a prima facie case. See Pet. App. 25 ("Absent effective rebuttal [of the prima facie case], the agency must be held to have carried its burden of persuasion."). See generally *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[5] Contrary to petitioners' representation (Pet. 18), the court did not hold that "mere absence during a strike of general knowledge will sustain a finding of strike participa-

agency may prove its case through circumstantial evidence. See, *e.g.*, *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983), slip op. 2 n.3. No removal case has required direct evidence of participation in a strike or proof of an overt act of participation beyond unauthorized absence from work where, as here, the agency's prima facie case of participation stands unrebutted.[6]

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tion." Rather, the court required that the agency produce evidence of unauthorized absence during such a strike; if the employee were to come forward with evidence explaining his absence, a finding of participation might not be supportable, depending on all of the circumstances of the particular case (Pet. App. 24-25).

[6] The cases cited by petitioners (Pet. 18) do not conflict with the decision below. In *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.) (three-judge court), aff'd mem., 404 U.S. 802 (1971), a challenge to the constitutionality of the statutory prohibitions against strikes by federal employees (see note 1, *supra*), the court stated only that participation in a strike means the withholding of one's services in concert with others, the same definition applied by the court of appeals here. *TVA* v. *Bailey*, 495 F. Supp. 711 (E.D. Tenn. 1980), an injunctive action, adopted the definition of strike participation set forth in *United Federation of Postal Clerks*. The court did not address the question whether proof of unauthorized absence during a strike of general knowledge would be sufficient to sustain an employee's removal. Rather, the court found only that an injunction was not justified in light of the absence of proof that the defendants had actually withheld their services in concert with others. *United States* v. *McCubbin*, No. 81-2059 (10th Cir. Aug. 22, 1983), is, as the court of appeals recognized (Pet. App. 43), inapposite because it was a criminal contempt proceeding requiring proof beyond a reasonable doubt, rather than a civil case such as this requiring proof only by a preponderance of the evidence (see 5 U.S.C. 7701(c)(1)(B)). Moreover, in *McCubbin*, a reasonable doubt existed with re-

To the contrary, the standard adopted by the Board and approved by the court is fully consistent with the applicable precedents.[7] See Pet. App. 27-28 ("The Board's decision in the present case did not change the standard of proof necessary to show strike participation, but merely clarified it."). Accordingly, there is no merit to petitioners' contention that they were denied a fair opportunity to present evidence on their own behalf by a post hoc change in the law.[8]

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spect to the defendants' failure to obey a back-to-work order because their absences could have been due to resignations rather than participation in the strike. Here, by contrast, petitioners have not argued that their removal was improper because they had resigned first.

[7] Although the prior decisions of the Board cited by petitioners (Pet. 13) as in conflict with its air traffic controller cases addressed situations involving picketing, the Board did not require any evidence of strike participation beyond what was produced here. Rather, the Board held only that the employees in those cases had successfully rebutted the evidence of strike participation by coming forward with evidence explaining their absence from work during the strike by their fear of personal injury if they crossed the picket line. See *Duckett* v. *TVA*, 9 M.S.P.B. 542 (1982); *Jones* v. *TVA*, 9 M.S.P.B. 550 (1982). Here, of course, petitioners produced no such evidence.

[8] Petitioners' claim of a due process violation is particularly unpersuasive because they point to no specific evidence that they would have introduced had they better understood the standards applied by the Board (see Pet. App. 28). Unlike many other controllers, petitioners did not take advantage of the opportunity afforded them before the Board to present evidence that they had not actually or willingly participated in the strike (*ibid.*). Petitioners' reliance on the Administrative Procedure Act fails not only because the Board did not depart from its previous standards, but also because neither

2. Petitioners' argument (Pet. 19-20) that their notices of removal improperly allowed less than seven days for a reply is meritless.[9] The court of appeals correctly determined (Pet. App. 41 n.3) that the notices, which called for replies "within 7 calendar days," allowed for the full seven days required by the statute. In any event, as the court noted (*ibid.*), petitioners have failed to show any harmful error (5 U.S.C. 7701(c)(2)(A)), because they have not pointed to any evidence of a reply that they could only have made on the seventh day, but failed to make because of a mistaken interpretation of the removal notices.[10] Finally, petitioners have waived this issue by failing to present it to the Board's presiding official (Pet. Supp. App. 18-19).

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the notice-and-comment nor the adjudication provisions of the Act apply to personnel matters. See 5 U.S.C. 553(a)(2), 554(a)(2). See generally *Stewart* v. *Smith*, 673 F.2d 485, 496-500 (D.C. Cir. 1982). The procedures relating to adverse actions against federal employees are governed by 5 U.S.C. 7501 *et seq.* and 5 U.S.C. 7701 *et seq.*

[9] 5 U.S.C. 7513(b)(2) provides that "[a]n employee against whom an action is proposed is entitled to * * * a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." Petitioners were not provided with the 30 days' advance notice normally required because there was "reasonable cause to believe [they] had committed a crime for which a sentence of imprisonment may be imposed" (5 U.S.C. 7513(b)(1); see 18 U.S.C. 1918). Petitioners do not now challenge the application of this exception.

[10] Petitioners' argument that any violation of the governing statute requires reversal would render a nullity the statutory requirement that harmful error be demonstrated. See Pet. App. 54-58 (Nies, J., concurring).

3. Petitioners argue next (Pet. 20-22) that legal memoranda of the Board's general counsel could not be distributed within the Board consistent with 5 U.S.C. 1205(g), which states that "[t]he Board shall not issue advisory opinions." The court of appeals correctly found (Pet. App. 8-9), however, that Section 1205(g) proscribes only the issuance by the Board of advisory opinions to the public, analogous to the prohibition of the federal courts from issuing advisory opinions. It would be incongruous to suppose that the Board's office of general counsel, whose primary function is to provide "legal advice to the Board and its staff" (5 C.F.R. 1200.10(c)), could not inform Board personnel of the results of its research. Nor is there any reason to believe that the general counsel's memoranda on the issues facing the Board in dealing with the unprecedented situation of the removal of more than 11,000 employees somehow improperly influenced the proceedings before the Board.[11]

4. Finally, petitioners contend (Pet. 22-25) that the Board improperly held that removal was the mandatory penalty under 5 U.S.C. 7311(3) for striking against the United States. Neither the Board

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[11] The Board noted (Pet. Supp. App. 24 n.19):

> The memorandum in question expressly stated that it was not intended to influence presiding officials' decisions. Presiding officials were not obligated to adopt the mode of analysis or the conclusions in the memorandum. In fact, presiding officials were cautioned to conduct their own legal research and to exercise independent fact-finding responsibility and judgment. The different findings on similar issues in the air traffic controller appeals evidence that presiding officials did undertake their own legal research and made independent fact findings.

nor the court of appeals, however, addressed this issue.[12] See *Schapansky* v. *FAA*, 1982 Fed. Mer. Sys. Rep. (Lab. Rel. Press) ¶ 7047, at XI-113 (MSPB Oct. 28, 1982) ("In the present case we need not decide whether, as a matter of law, mitigation of the penalty is foreclosed under § 7311(3)."); Pet. App. 31-32 ("Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided."). Rather, as the Board[13] and the court of appeals found, removal for striking against the United States in violation of the law and one's oath was fully justified under the circumstances of these cases (Pet. App. 30, 32):

> Congress has determined that removal is an appropriate penalty for striking against the government. * * * Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. * * *

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[12] Moreover, petitioners did not appeal to the full Board from the presiding official's determination that removal was an appropriate penalty for their strike participation (Pet. Supp. App. 12).

[13] In *Schapansky*, the Board noted (1982 Fed. Mer. Sys. Rep. (Lab. Rel. Press) at XI-113 (footnote omitted)):

> [T]he position of air traffic controller is a highly sensitive one because the incumbent is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the public who rely on him. A controller's intentional and ongoing abdication of that responsibility in order to participate in the strike, and his decision to continue striking despite the President's 48-hour grace period, thus constitute particularly egregious conduct which destroys the controller's unique relationship of trust with his employer.

* * * * *

> [T]he penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

Removal was clearly well within the agency's discretion here, where "the inescapable and thus intentional goals of [petitioners], absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety" (Pet. App. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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